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No. 510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

AMERICAN TRUCKING ASSOCIATIONS, INC., AND
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,
Appellants,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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REPLY TO MEMORANDUM AND MOTIONS TO AFFIRM

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STATEMENT

Motions to affirm the decision of the district court below have been filed by appellees South Paterson Trucking Company, Inc., Private Carrier Conference, Inc.,[1] The Pennsylvania Public Utility Commission, and Na-

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[1] Although the joint motion of South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., carries only the docket number 511, we assume it was intended to apply also to this proceeding, and so treat it.

tional Industrial Traffic League, hereinafter jointly referred to as "appellees." A joint memorandum was filed by the United States and Interstate Commerce Commission (hereinafter sometimes "Government") in which they do not oppose the Court's noting probable jurisdiction, but raise the question of whether the case presents justiciable issues. Since the issues involved in this proceeding are important to the Commission's administration of the Interstate Commerce Act, and vitally concern the motor carrier industry represented by appellants, we deem it necessary to reply, pursuant to Rule 16(3), to the memorandum of the Government and appellees' motions to affirm.

I

Issues Involved in This Proceeding Are Justiciable and of Practical Importance

The Government, in its memorandum, after stating that it does not oppose the noting of probable jurisdiction, suggests, however, that there may be a question regarding justiciability. (p. 3)

We disagree strongly with the Government that this proceeding might not be justiciable. In our Jurisdictional Statement, we pointed out in detail that the Commission's finding that the for-hire transportation at issue is not in interstate commerce subject to its economic jurisdiction may well result in a hiatus in the regulatory scheme and free an important segment of the motor carrier industry from any regulation.

The potential scope, from a freight and revenue standpoint, of the for-hire movements of such motor carriers is significant. To illustrate, a manufacturer located in State A and having a shipment going to a point in adjoining State B, would be encouraged, by the Commission's decision, to transport his shipment across the state line, and there to give it to a single-state, for-hire motor carrier

for movement to ultimate destination, thus avoiding both state and federal control. There are a great number of manufacturers so situated, who would take advantage of such a hole in the regulatory structure. It is our fear that the practical result of the decision below will be to divert traffic from many carriers operating on slim margins of profit, with the result that their ability to discharge their statutory duty to render adequate and efficient service to the public will be impaired. Aside from the loss of traffic, the Commission's decision will have a far-reaching effect in the field of safety regulation. As we noted in our Jurisdictional Statement (pp. 22-23), its finding that the for-hire transportation at issue is in *intrastate* commerce, for economic purposes, raises grave doubt whether it is *interstate* commerce for safety purposes.

It must be noted also that appellants and appellees, which represent a large segment of the transport field and its users, are not the only ones who regard this proceeding as one that will have a significant impact on the transportation industry. Besides the parties before the Court, 37 others, including rail and motor carriers, manufacturers, motor carrier associations and associations of manufacturers, and state regulatory Commissions filed statements with the Commission containing their views on this matter when the Commission invited participation by interested persons (J.S. p. 34). And, not to be overlooked either, is that the Commission never questioned the significance and practical impact of its decision until this time. Indeed, the Commission instituted this proceeding for the specific purpose of resolving close to 15 years of conflict between two of its divisions.

It is clear from the foregoing that the Commission's decision here will have an immediate and practical impact on for-hire motor carriers who are engaged in transportation between points in a single state, on for-hire motor carriers who operate across state lines, and on

shippers as well. The decision is, therefore, not abstract, theoretical, or academic; it touches vital interests of carriers and shippers alike and sets standards for shaping the manner in which an important segment of trucking business will hereafter be done. In the circumstances, we submit that the issues raised in this proceeding are justiciable and that the Court should hear this case on its merits.

II

Appellees' Arguments

Appellees advance four reasons to support the affirmance of the district court's decision. These are:

1. The issue here before the Court has been decisively settled in *Pennsylvania R.R. Co.* v. *Public Utilities Commission*, 298 U.S. 170 (1936).

2. The conclusion that the Commission has economic jurisdiction over the involved single-state, for-hire motor carriage would create serious regulatory problems.

3. Congress intended to equalize the regulation of the railroads and the motor carrier industries and to find that the rates of the for-hire carrier under consideration are subject to the Commission's economic regulation is contrary to Congress's National Transportation Policy.

4. The existence of jurisdiction in the federal agency over the subject for-hire carriage would oust jurisdiction which properly lies with the states.

There is no need to reply to the third point because a cursory comparison of Parts I and II of the Interstate Commerce Act shows clearly that there are significant differences in the regulatory scheme for the two modes of transport, and the general provisions of the National Transportation Policy cannot be read to obliterate those differences. *I.C.C.* v. *New York, New Haven & Hartford*

R. Co., 372 U.S. 744, 762 (1963). And there is no need to reply to the fourth point either because we have discussed it at length in our Jurisdictional Statement (pp. 17-20). However, we will comment briefly on the remaining two contentions.

III

The Pennsylvania Case Is Not Controlling

In their motions to affirm appellees say that the *Pennsylvania* case made it clear that transportation begins only when merchandise has been placed in the possession of a carrier subject to economic regulation, that a shipper is not a carrier subject to economic regulation under the provisions of what is now Part I of the Interstate Commerce Act, and that conveyance by a common carrier cannot be combined with carriage by the owner "for the purpose of subjecting the whole to the operation of the statute when the parts would be exempt."

To support their position appellees rely on the statement in the *Pennsylvania* case that whether the rail movement was in interstate commerce was not controlling for the purpose of "determining the application of this Act." "Transportation begins for that purpose, if not for others, when the merchandise has been placed in the hands of a carrier." 298 U.S. at 175. But this statement cannot be taken out of context. What the Court was saying is clear: Since Section 1(1) of Part I of the Interstate Commerce Act applies only to rail common carriers engaged in transportation in interstate commerce across state lines obviously transportation subject to the Commission's jurisdiction could not be said to begin until property was placed in a railroad's possession for transportation by rail from one state to another. However, unlike Section 1(1), Section 202(a) applies to "transportation . . . by motor carriers engaged in interstate or foreign commerce," and there is no exemption of trans-

portation in interstate commerce within a single state. Thus, it is irrelevant where, in the course of the transportation in interstate commerce, the transportation by the for-hire motor carrier begins.[2]

The Commission has a statutory duty to exercise its economic regulatory authority over transportation by for-hire motor carriers engaged in interstate commerce notwithstanding that their physical operations are wholly within a single state. And it is the interstate character of the overall commerce that determines the scope of the Commission's regulation of transportation by for-hire motor carriers. The plain words of Sections 202(a) and 202(a)(10) of Part II of the Act can be read in no other way and there is nothing in their legislative history to suggest that they were intended to be read otherwise.

That appellees have erroneously read the *Pennsylvania* case as supporting their motions to affirm is further shown by the action of the Commission in this proceeding. In concluding that the single-state, for-hire carriage at issue is not subject to its economic regulation, the Commission cited the *Pennsylvania* case and gave as its reasons for so holding the same ones expressed by appellees (J.S. p. 45). The Commission adhered to this position before the district court. However, the Commission has now changed its position. It now admits that the *Pennsylvania* case may not be controlling, because of the difference in the language of Parts I and II defining its jurisdiction. Thus it states in its memorandum:

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[2] Equally irrelevant, and completely incorrect, is the statement contained in the motion of appellees South Paterson Trucking Co. and Private Carrier Conference (p. 5) that the *Pennsylvania* case was decided in the light of this Court's knowledge of the Commission's safety jurisdiction over private motor carriage. As a matter of fact, the Commission exercised no such jurisdiction until four years after the *Pennsylvania* decision, when it found, pursuant to § 204(a)(3), 49 U.S.C. § 304(a)(3), that there was a need "therefor." *Motor Carrier Safety Regulations—Private Carriers*, 23 M.C.C. 1 (1940).

> The Commission's holding that it lacks economic regulatory authority if the connecting interstate movement is performed by the shipper is supported by the construction given its authority over railroads in the *Pennsylvania R. Co.* case, *supra.* By analogy, the Commission's authority over motor movement may be deemed to attach only if there is a for-hire segment crossing State lines. But there are differences between the parts of the Act which make the analogy imperfect. Under Part II, for example, the Commission has jurisdiction to reach interstate private carriage for safety (not economic) purposes and, in the report below, it left open the possibility that the for-hire carriage here at issue might be interstate transportation for purposes of safety regulation (J.S. 45-46). And the language used to define the Commission's jurisdiction is different in these two parts of the Act. Before the decision below, two of the Commission's divisions had, in seven reported decisions, reached conflicting conclusions as to its economic authority over the carriage at issue (J.S. 40-43). We cannot say that the question of the Commission's statutory jurisdiction is so insubstantial as not to warrant plenary hearing. In this respect, therefore, we do not oppose the noting of probable jurisdiction. (Memorandum, pp. 2-3).

It is clear, therefore, and the Government agrees, that the *Pennsylvania* case is distinguishable from the case now before the Court.

IV

A Holding That the Commission Has Economic Jurisdiction Would Not Create Regulatory Problems

Appellees claim that for this Court to hold that the involved for-hire motor carrier transportation is subject to the Commission's economic jurisdiction would result in a disruption of present transportation practices and impose burdens upon shippers and carriers alike.

The short answer to this contention is that the Commission, the federal agency charged with the responsibility of administering the Interstate Commerce Act, makes no claim that our interpretation of the Act would create regulatory problems, much less cause chaos. The shipper knows whether his shipment is to have a continuous movement from a point in one state to a point in another. If it is such a shipment, he has an obligation to tender it to a motor carrier with appropriate interstate operating rights. This is no problem, because shippers face this situation every day and without apparent difficulty.

As to the motor carrier's alleged inability to determine what rates to apply to the shipment, we point out that motor carriers, as well as railroads, are confronted daily with the task of determining whether to apply intra- or interstate rates on a given movement. See *Baltimore & Ohio S. W. R.* v. *Settle*, 260 U.S. 166 (1922); *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U.S. 257 (1927); *United States* v. *Majure*, 162 F. Supp. 594 (1957); *Petroleum Products Transported Within A Single State*, 71 M.C.C. 17 (1957). In all those cases it was necessary to determine whether transportation performed within a single state was part of a continuous movement in interstate commerce, a question that can be answered only by ascertaining the shipper's fixed and persistent intent at the time of shipment.

CONCLUSION

Appellants respectfully submit that the questions posed by the decision below are of extreme public importance and require plenary consideration by this Court. Therefore, appellants request that the motions to affirm be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 6th day of December, 1965, I served copies of the foregoing document on the several parties hereto, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to the Honorable

Thurgood Marshall, The Solicitor General, Department of Justice, Washington, D. C. 20530; to Robert B. Hummel, Esq., Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D. C. 20530; and to Drew J. T. O'Keefe, Esq., United States Attorney, Eastern District of Pennsylvania, Philadelphia, Pennsylvania.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and I. K. Hay, Esq., Deputy General Counsel, at the Offices of the Commission, Washington, D. C. 20423.

3. On the Pennsylvania Railroad Company, by mailing copies in duly addressed envelopes, with postage prepaid, to Carl Helmetag; Esq., Assistant General Counsel, and Carmine J. Liotta, Esq., 1138 Transportation Center, Six Penn Center Plaza, Philadelphia, Pennsylvania.

4. On South Paterson Trucking Co., Inc., and Private Carrier Conference, Inc., by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph E. Keller, Esq., and William H. Borghesani, Jr., Esq., 1712 N Street, N. W., Washington, D. C. 20036.

5. On the National Industrial Traffic League, by mailing copies in duly addressed envelopes, with postage prepaid, to John F. Donelan, Esq., and William L. Slover, Esq., 888 - 17th Street, N. W., Washington, D. C.

6. On the Pennsylvania Public Utility Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Joseph C. Bruno, Esq., Chief Counsel, and William A. Goichman, Esq., Assistant Counsel, North Office Building, Harrisburg, Pennsylvaia.

PETER T. BEARDSLEY